(9)

No. 88-1640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Petitioners,

v.

DICK THORNBURGH,
United States Attorney General, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* LITTLE ROCK NEWSPAPERS, INC. IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Little Rock Newspapers, Inc. ("LRNI") adopts the petitioners' statement of the questions presented:

1. Does this Court's decision in *Chevron, U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984) ("*Chevron*"), require a reviewing court to defer to an administrative agency's expansive interpretation of an exemption from the antitrust laws where the agency's construction is at odds with the established rule that exemptions from the antitrust laws must be narrowly construed?

2. In determining whether two competitively equal newspapers qualify for an antitrust exemption under the Newspaper Preservation Act, which requires that one of them be in "probable danger of financial failure," may the Attorney General approve the application on the basis of a construction of the Act that only requires (a) a showing that both papers have lost money for several years and (b) a statement by representatives of the "non-failing" paper that it will not raise its prices even if the exemption is denied?

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BRIEF OF *AMICUS CURIAE* LITTLE ROCK NEWSPAPERS, INC. IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is filed on behalf of LRNI with the written consent of all parties. LRNI publishes the *Arkansas Democrat* in Little Rock, Arkansas, one of only 25 cities in the United States where two separately owned daily newspapers compete for news, advertising and circulation. The *Arkansas Gazette*, a newspaper owned by Gannett Co., Inc. ("Gannett"), the same company that owns the *Detroit News*, competes directly with the *Arkansas Democrat*.

As publisher of a paper in a two newspaper market, LRNI has been and will continue to be directly affected by the precedent set by the affirmance of the joint operating agreement between the *Detroit Free Press* and the *Detroit News*. LRNI participated as *amicus curiae* before both the district court and the court of appeals, and LRNI's position was discussed in the opinions of the court of appeals. LRNI described events in the Little Rock newspaper market immediately after the initial approval of the Detroit joint operating agreement ("JOA") that provide a vivid illustration of the impact of the Attorney General's decision on competition in the newspaper industry.

Since acquiring the *Arkansas Gazette*, a previously profitable newspaper, Gannett has operated the paper at an intentional and substantial loss for the apparent purpose of forcing the *Arkansas Democrat* to incur more substantial losses. As was done in Detroit, Gannett increased discounting of circulation prices to unprecedented levels, increased promotional expenditures to record highs, and reduced advertising rates after the *Democrat* implemented rate increases. Six days after approval of the Detroit JOA by the Attorney General, Gannett reduced home delivery subscription rates to all subscribers of the *Gazette* by 57.5 percent. This reduction was made at a time when the *Gazette's* circulation was already increasing.

If the *Democrat* is forced to match losses with a company generating over $590 million annually in pre-tax profits, the alternative it ultimately may face is the prospect of elimination from the market unless it seeks a JOA. So long as Gannett can pursue such a strategy in Little Rock and elsewhere, using Detroit as a precedent, Gannett is free to eliminate economic competition in the remaining 25 competitive newspaper markets.

STATEMENT OF THE CASE

LRNI adopts petitioners' statement of the case.

SUMMARY OF ARGUMENT

1. The panel majority failed to give voice to the congressional intent evident from the language and structure of the Newspaper Preservation Act, its legislative history, and the applicable canon of statutory construction. As a result it misapplied this Court's decision in *Chevron* to require deference to an agency decision that is clearly inconsistent with Congressional intent. In this case Congress already had struck the balance between compelling policies in the Act to favor narrow access to a JOA and the antitrust exemption of the Act. There was no intention in the Act either to abrogate the established canon of statutory construction that antitrust exemptions are to be narrowly construed or to defer to the Attorney General's decision where he disregards both that canon and congressional intent.

2. In affirming the Attorney General's construction of the statutory requisite of "probable danger of financial failure" to require only a showing that (a) losses exist and (b) those losses cannot be unilaterally reversed, the majority affirmed an interpretation of the Act that failed to draw any distinction between the two separate definitions of failing newspaper Congress purposely adopted under the Act. It also misapplied the application of the test for determining "probable danger of financial failure" utilized by the Ninth Circuit in *Committee for an Indep. P.I.* v. *Hearst Corp.*, 704 F.2d 467 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983) ("*Hearst*"). As a result, the majority wrongly concluded that newspapers themselves can create the conditions necessary to obtain a JOA through their own competitive behavior without regard to market forces.

3. In affirming the Attorney General's decision to approve a JOA between two papers, each of which incurred

losses as a part of deliberate competitive strategies and which, despite those strategies, remain virtual competitive equals, the majority gave judicial approval to questionable and probably destructive competitive behavior and created a blueprint for the similar destruction of competition in other two newspaper cities that even now is being used in Little Rock.

ARGUMENT

I. *CHEVRON* DOES NOT AUTHORIZE DEFERENCE TO THE ATTORNEY GENERAL'S DECISION IN THIS CASE

A. The Court of Appeals Misread And Misapplied *Chevron* In Disregard Of Congress' Clear Intent

The analysis required by *Chevron* for court review of agency decisions is well known. The reviewing court must determine first "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. In making the determination, the reviewing court necessarily looks at all indicators of congressional intent by "employing traditional tools of statutory construction." *Id.* at 843, n.9. If after such examination the court determines there is not evidenced an "unambiguously expressed" intent, it then must turn to a second inquiry, *i.e.*, to determine if the agency's determination "is based on a permissible construction of the statute." *Id.* at 843. If the agency decision is "a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," the court "should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 845, *quoting United States* v. *Shimer*, 367 U.S. 374, 382, 383 (1961).

The role of legislative intent is important under *Chevron*. This is so regardless of whether a specific intent is discerned by the reviewing court or, absent such

specificity, the reasonableness of an agency decision is being measured. This Court in *Chevron* itself, having determined that a specific congressional intent was not evident, used the evidence of intent present in the legislative history to measure the reasonableness of EPA's determination against "the legislative history as a whole" to ascertain intent even where the precise issue was not addressed in the legislative history. 467 U.S. at 862-863. *See also NLRB* v. *United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987).

The panel majority, "unable to discern a specific congressional intent governing this case," applied *Chevron* to compel deference to the Attorney General's interpretation of "probable danger of financial failure" as a permissible interpretation under the Act. *Michigan Citizens for an Indep. Press* v. *Thornburgh*, 868 F.2d 1285, 1291 (D.C. Cir. 1989) (*"Michigan Citizens"*). The majority found the Attorney General's interpretation reasonable because it was based on his application of the test developed by the Ninth Circuit in *Hearst* and on his prediction of the future behavior of the competing Detroit newspapers, namely, that the *News* would continue to price below cost and, in doing so, would outlast the *Free Press*, and that the threat of management to close the *Free Press* " 'cannot be wholly disregarded.' " *Id.* at 1290, 1291.

According to the majority, the fact that the Attorney General's interpretation did not employ the canon of statutory construction that exemptions to the antitrust laws must be construed narrowly was irrelevant because *Chevron* prohibits such application:

> But *Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable *agency* interpretations of ambiguous statutes. If a statute is ambiguous, a reviewing court cannot reverse an agency decision merely because it failed to rely on any one of a number of canons of construction that might have shaded

the interpretation a few degrees in one direction or another. (Emphasis in original.)

Michigan Citizens, 868 F.2d at 1292.

The panel majority was wrong because Congress' intent in passing the Newspaper Preservation Act was clear. Using the "traditional tools of statutory construction" as in *Chevron*, the court of appeals had to conclude that Congress had a clear intent (1) as to the meaning and interpretation of the statutory term "probable danger of financial failure" in the definition of "failing newspaper," (2) that the meaning of "probable danger" is ultimately a matter for judicial interpretation, and (3) that the antitrust exemption under the Act was to be available to post-enactment JOAs only upon satisfaction of a tougher, more stringent test than applies to pre-enactment JOAs, in order to prevent premature resort to a JOA. Congress already had struck the balance between the competing policies of the Act to favor narrow access to a JOA and the antitrust exemption in the Act. In view of this strong manifestation of Congressional intent, the panel majority wrongly deferred to the Attorney General's minimalist determination that the *Free Press* is a "failing newspaper" only because it is losing money and could not unilaterally restore itself to a profitable position.

Unlike the situation in *Chevron*, this case does not involve a technical and complex statutory regime. Unlike the EPA Administrator in *Chevron*, the decisionmaker here, the Attorney General, is not an expert in the antitrust field and in fact reached conclusions contrary to those in his Department who are experts. Unlike the statute in *Chevron*, in the Newspaper Preservation Act Congress effectively made the central policy choice rather than commit it to agency discretion. The "detailed and reasoned" consideration in this case, *Chevron*, 467 U.S. at 865, was performed by the Administrative Law Judge whose legal conclusions were reversed by the Attorney General. Moreover, this case involves both a far less complicated statute and one that grants an antitrust exemption, an area traditionally left to the close review of the judiciary. For all these reasons, the deference accorded to the Attorney General's decision under the majority's reading of *Chevron* was wrong and should be reversed.[1]

B. The Language and Structure of the Newspaper Preservation Act and Its Legislative History Demonstrate that Congress Intended Narrow Access to Post-Enactment JOAs

The Newspaper Preservation Act was Congress' reaction to this Court's decision in *Citizen's Publishing Co.* v. *United States*, 394 U.S. 131 (1969) ("*Citizen's Publishing*"). In that case, the Court held that the 25-year old joint operating agreement between two Tucson, Arizona newspapers violated both the Clayton and Sherman Antitrust Acts and that neither paper qualified as a "failing company"—the only defense then available to an otherwise illegal combination. At the time the Tucson papers entered into their JOA in 1940 one paper was losing money. Yet, this Court held that it was not a "failing company" because there had been no showing that it was on the brink of collapse, with dim or non-

[1] At a minimum these factors would support the need for "a more searching review of the reasonableness" of the Attorney General's interpretation, K. W. Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. on Reg. 283, 299 (1986). In addition to the ample evidence in this case that Congress specifically intended that the availability of post-enactment JOAs should be narrowly limited, however, these factors serve to emphasize that deference to the agency decision here is inappropriate. *Cf. Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983) ("reviewing courts . . . must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute'" (citation omitted)).

existent prospects for reorganization and no prospect of a buyer. *Citizen's Publishing*, 394 U.S. at 136-139.

Concerned that 22 other JOAs in other cities would similarly be attacked years after they had been entered into, Congress fashioned a statute in response to *Citizen's Publishing* that not only articulated two different definitions of a failing newspaper, one for JOAs entered into before the Act's effective date (July 24, 1970) and another for JOAs sought after that date, but also required each post-enactment JOA to obtain the Attorney General's approval.

Congress established a lenient test for the 22 existing JOAs to qualify for the antitrust exemption under the Act. This was a recognition of the "prolonged period in which the participants had engaged in these joint newspaper operating arrangements in the belief that such activities were lawful, and in view of the prolonged period in which the Department of Justice permitted the arrangements to operate without challenge. . . ." H. Rep. 1193, 91st Cong., 1st Sess. 9 (1970).[2] Thus, the Act provides that the existing pre-1970 JOAs are not unlawful if at the time they were entered into not more than one party was a paper "likely to remain or become financially sound." 15 U.S.C. 1803(a).

In contrast, to qualify for a JOA after July 24, 1970, at least one paper had to be "in probable danger of financial failure." 15 U.S.C. § 1802(5). The "probable

[2] The legislative history indicates considerable concern over the future of existing JOA's. Twenty-one members discussed the need for leniency for existing JOAs during the debates. *See, e.g.*, 116 Cong. Rec. H6454 (daily ed. July 8, 1970) (statement of Rep. McCulloch) ("In the capital city of Ohio, Columbus, two newspapers, the Dispatch and the Citizens Journal, executed a joint operating agreement in 1959 . . . However, the legality and continued existence of these arrangements all over the country have been threatened by the decision in Citizens Publishing Co. against United States . . . .").

danger" test was intended to be "far more stringent", 116 Cong. Rec. H6452 (daily ed. July 8, 1970) (statement of Rep. Kastenmeier) and "limited only to those situations where a joint newspaper operating arrangement is demonstrably essential to prevent a newspaper failure." *Id.* at H6454 (statement of Rep. McCulloch); *see id.* at H6460 (statement of Rep. Railsback).

In addition to this more stringent test, the Act's required approval of the Attorney General for post-enactment JOAs was intended to "act as a brake upon other newspapers which otherwise might prematurely turn to joint operating arrangements, without testing other means of maintaining full commercial and editorial competition." 116 Cong. Rec. S938 (daily ed. Jan. 30, 1970) (statement of Sen. Hruska). This procedure insured that the antitrust exemption would not be easily obtained: "[T]he prospective availability of the exemption has been sharply restricted by requiring the consent of the Attorney General for any future joint arrangement and by circumscribing his power to consent through the use of a strict definition of 'failing newspaper.'" 116 Cong. Rec. H6460 (daily ed. July 8, 1970) (statement of Rep. Railsback).

Congress viewed the "probable danger" test as a clear standard derived from the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), and interpreted by this Court in *United States* v. *Third Nat'l Bank*, 390 U.S. 171 (1968) (*"Third Nat'l"*). *See* S. Rep. 535, 91st Cong., 1st Sess. 2 (1969). As Congressman Kastenmeier stated: "The term 'in probable danger of financial failure' is one that has a legislative history. It comes out of the Bank Merger Act. It is understood by the courts in the field, and happens to be a term that is well-known." 116 Cong. Rec. H6452 (daily ed. July 8, 1970) (statement of Rep. Kastenmeier).

The Bank Merger Act of 1966 conferred an antitrust exemption for bank mergers that would otherwise violate the Clayton Act standard that it contained. Such an exemption had to be authorized in each case by the Comptroller of the Currency upon the appropriate statutory finding. In reviewing such a finding in *Third Nat'l*, this Court required that "before a merger injurious to the public interest is approved, a showing be made that the gain expected from the merger cannot reasonably be expected through other means." *Third Nat'l*, 390 U.S. at 190. Under *Third Nat'l* applicants must "reliably establish the unavailability of alternative solutions" before the antitrust exemption is justified. *Id.*[3]

Under the Bank Merger Act the courts have broad responsibility for interpreting and reviewing agency interpretations: "[I]t is the court's judgment, not the Controller's, that finally determines whether the merger is legal." *United States* v. *First City Nat'l Bank*, 386 U.S. 361, 369 (1967). "The courts have never given presumptive weight to a prior agency decision, for the simple reason that Congress put such suits on a different axis than was familiar in administrative procedure." 386 U.S. at 369. This Court's pronouncement in this regard in the bank merger context is fully consistent with the traditional role given to the judiciary in enforcing antitrust policy. From administering the "rule of reason" to determining effects on competition, the courts' "appraisal of competitive factors is grist for the antitrust mill." *United States* v. *First City Nat'l Bank*, 386 U.S. at 369.

The focus of the Newspaper Preservation Act's dual definition structure, therefore, was to protect the 22 existing JOAs that Congress perceived to be at risk but to raise barriers to future JOAs by stiffening the qualification requirements, thus ensuring that the exemption to the antitrust laws carved out by the Act would be limited in its availability and its application. Moreover, by selecting the "probable danger" test with its history of judicial interpretation, Congress not only intended a similarly strict test under the Act, but also expected the courts to play their traditional role in its interpretation and not to give deference to the Attorney General.

[3] This Court in *Third Nat'l* also stated that banks cannot qualify for an antitrust exemption simply through financial mismanagement, 390 U.S. at 189, 192, a conclusion adopted by the Ninth Circuit in *Hearst*. 704 F.2d at 478.

C. The Canon of Statutory Construction That Antitrust Exemptions Are to be Narrowly Construed Underlines Congressional Intent to Restrict the Availability of Post-Enactment JOAs

Congress provided in the Newspaper Preservation Act "only a limited exemption from the antitrust laws," 116 Cong. Rec. S938 (daily ed. Jan. 30, 1970) (statement of Sen. Hruska), demonstrating yet again what this Court has termed the "longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws." *Community Communications Co.* v. *Boulder*, 455 U.S. 40, 56 (1981). Consistent with the importance given to the antitrust laws by Congress and the courts is the established canon of statutory construction that exemptions to the antitrust laws should be construed narrowly. *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Federal Maritime Comm'n* v. *Seatrain*, 411 U.S. 726, 733 (1973). The importance of this canon in particular has been reaffirmed and emphasized by this Court subsequent to its decision in *Chevron. Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409, 421 (1986).

The deferential review accorded to the Attorney General's decision by the panel majority specifically declined to consider this critical canon of statutory construction.[4]

[4] Respondents have argued that the statement of the majority that *Chevron* "precludes courts picking and choosing among various canons of statutory construction to reject reasonable *agency* inter-

In holding that the canon cannot serve as a vehicle for overruling an otherwise reasonable agency decision, the court relegated the canon to the role of an alternative policy choice the Attorney General could have made but was not required to make in balancing the competing imperatives of the Act. *Michigan Citizens*, 868 F.2d at 1293. This approach is inconsistent with the important role assigned to the use of canons in *Chevron* itself. 467 U.S. at 843 n.9. If a canon of statutory construction is a tool to determine congressional intent, it is far more than a mere policy choice an agency can choose to ignore at will.

The majority's holding that this canon of statutory construction is inapplicable when interpreting the Act conflicts with previous pre- and post-*Chevron* decisions of this Court. *See Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. at 421 ("exemptions from the antitrust laws are to be strictly construed and strongly disfavored"); *Federal Maritime Comm'n v. Seatrain*, 411 U.S. at 733 (a "broad reading of [the Shipping Act of 1916] would conflict with our frequently expressed view that exemptions from the antitrust laws are strictly construed."). It also conflicts with post-*Chevron* decisions that have relied upon other important canons of statutory construction in reaching their results. *See, e.g., Bowen* v. *Georgetown Univ. Hosp.*, 109 S. Ct. 468, 471 (1988) (statutes to be construed as not conferring implied authority to issue retroactive regulations); *Bowen* v. *Amer-*

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pretations of ambiguous statutes," *Michigan Citizens*, 868 F.2d at 1292 (emphasis in original), is *dictum* and that the Attorney General in fact implicitly considered the canon by applying the test evolved by the Ninth Circuit in the *Hearst* case. Brief of Respondent Detroit Free Press in Opposition to Petition for Certiorari at 16. The court of appeals, however, held that under a *Chevron* deference analysis of the Attorney General's decision the canon is insignificant. Moreover, the Attorney General, unlike the court in *Hearst*, never explicitly discussed the canon or how it applied to his decision.

ican Hosp. Assoc., 476 U.S. 610, 644 n.33 (1986) (statutes in derogation of sovereignty to be strictly construed); *Immigration and Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (construing any lingering ambiguities in deportation statutes in favor of alien).

Nothing in *Chevron* or in this Court's decisions since *Chevron* suggest that a reviewing court is bound by *Chevron* to ignore a guide "of such 'fundamental importance' . . . to antitrust law administration." *Michigan Citizens*, 868 F.2d at 1300 (Ruth B. Ginsburg, J., dissenting).

II. THE PANEL DECISION AFFIRMS AN INTERPRETATION OF THE NEWSPAPER PRESERVATION ACT THAT IS INCONSISTENT WITH CONGRESSIONAL INTENT AND WRONG AS A MATTER OF STATUTORY INTERPRETATION AND CONGRESSIONAL POLICY

A. The Panel Failed to Distinguish Between the Separate Standards for Pre-1970 and Post-1970 JOAs

The panel majority affirmed as reasonable the Attorney General's conclusion that the *Detroit Free Press* had met the standard of "failing newspaper" by demonstrating that it had suffered operating losses over a period of years and that those losses could not be reversed by the unilateral action of the *Free Press*. *Michigan Citizens*, 868 F.2d at 1290. Thus, although the Administrative Law Judge and the Antitrust Division had advised against approval of the JOA, Administrative Law Judge Morton Needleman's Recommended Decision, Docket No. 44-03-24-8 (Dec. 29, 1987) ("ALJ") at 43, the Attorney General concluded that the *Detroit Free Press*, with almost half the daily circulation in the Detroit market, was "in probable danger of financial failure" and qualified for a JOA under the Act. As the majority opinion acknowledged, a JOA has never before been approved where the so-called "failing newspaper" claimed such a sizable

segment of the market. *Michigan Citizens*, 868 F.2d at 1292.

The Attorney General conceded that the *Free Press* is clearly not in a "downward spiral" that is traditionally found in JOAs, where loss of circulation leads to loss of advertising which in turn leads to more circulation losses. Attorney General's Decision and Order, Docket No. 44-03-24-8 (Aug. 8, 1988) ("Attorney General's Decision") at 8. As a result, the Attorney General's finding of "probable danger of financial failure" was indistinguishable from a finding under the pre-1970 standard of "not likely to become or remain financially sound." Thus, contrary to the clearly distinct categories established by Congress in the Newspaper Preservation Act, the Attorney General in this case effectively has equated the test of a "failing newspaper" for JOAs entered into after 1970 with the test for pre-1970 JOAs.

The Attorney General's failure to distinguish his definition of "failing newspaper" under Section 1803(b) of the Act from the lesser standard in Section 1803(a) troubled the dissenting member of the panel:

> . . . the Decision affords no assurance that the Attorney General has found a "middle ground" firmer than the pliant "not likely to . . . become financially sound" ground that Congress thought inadequate for new agreements. The Decision never suggests any separate content for the "probable danger" standard to distinguish it from the more accommodating one.

Michigan Citizens, 868 F.2d at 1299. (Ruth B. Ginsburg, J., dissenting).

The majority dismissed this concern as an attempt to require the Attorney General to draw "the exact boundaries between the two sections" and therefore "to offer dicta that we normally eschew." *Michigan Citizens*, 868 F.2d at 1294. Far from seeking to require the Attorney General to offer *dicta*, however, Judge Ginsburg properly identified the need to distinguish between the two tests in order to give effect to the congressional intent

and purpose behind the distinction. Congress drew the boundaries and the Attorney General was required only to apply them. The Attorney General, however, with the concurrence of the panel majority, effectively collapsed the two standards and thus failed to give meaning to a critical distinction central to the congressional intent evident in the scheme of the Act.

The Attorney General also concluded, and the panel majority agreed, that the "probable danger of financial failure" test could be met if the *Free Press*' losses were caused by the willingness of the *News* to continue to incur losses by refusing to raise prices, in order to drive the *Free Press* from the market or jointly to persuade the Attorney General to grant a JOA. The panel majority found this reasoning consistent with the Act: "[A] newspaper owner who holds an advantage in a two newspaper city might be irrational if he did *not* attempt to drive his competitor out of business. Otherwise, he might wake up one day to realize that he had lost the superior position and was already himself in the downward spiral." *Michigan Citizens*, 868 F.2d at 1302 (emphasis in original).

Under this interpretation of the Act, the *News*' losses, although deliberately sustained, are "irreversible" because the *News* cannot relent in its below-cost pricing strategy without the risk of losing its edge in the circulation and advertising markets. Although acknowledged as the "leading" paper in Detroit (with leads in "most of the circulation, revenue, and advertising lineage figures", *Michigan Citizens*, 868 F.2d at 1290), the *News* nonetheless qualifies as a "failing newspaper" under the Attorney General's view because it is suffering losses and cannot unilaterally reverse those losses, except at the risk of possibly losing its slight lead in the market. This is not what Congress intended for post-1970 JOAs.

The relationship between a "downward spiral" and the statutory test of "probable danger of financial loss" was

recognized by the Ninth Circuit in *Hearst* but wholly ignored by the panel majority here. In *Hearst* the losses suffered were evidence of a paper in a downward spiral and thus legitimately "irreversible." In this case the losses are the result of competitive strategic choices that the Administrative Law Judge and the Assistant Attorney General for Antitrust perceived to be reversible if the JOA were denied. As the dissent stated:

> Without the lure of a JOA, however, what reason is there to believe that the losses here "likely *cannot* be reversed"? Absent the Attorney General's promise of that large pot of gold, would the parties not have, as the Antitrust Division suggested, an effective "incentive to adopt strategies directed toward achieving profitability in a competitive marketplace"?

Michigan Citizens, 868 F.2d at 1299 (Ruth B. Ginsburg, J., dissenting) (citations omitted) (emphasis in original). Permitting a JOA on the basis affirmed below undermines the statutory scheme and should not be permitted.[5]

B. The Decision Permits Parties to Justify a JOA Through Their Own Predatory Behavior Without Regard to Market Forces

For JOAs that pass statutory muster, the Act provides immunity from prosecution under the antitrust laws for such practices as market sharing, price fixing and monopolization. 15 U.S.C. § 1802(1). It is a more limited

[5] The statements of Knight-Ridder executives that the paper will close if the JOA is not granted, *Michigan Citizens*, 868 F.2d at 1291, repeated in the *Free Press* pleadings before the court of appeals and in this Court, *see, e.g.*, Brief in Opposition to Petition for Certiorari of Detroit Free Press, Incorporated at 22, appear at odds with a current advertising campaign in the *Free Press*. *See* Appendix A, an advertisement that has run in the *Free Press* on several occasions, most recently on June 21, 1988. The advertisement states: "The trend is clear. The *Free Press* is the newspaper gaining momentum in metro Detroit. Fact is, *Free Press* circulation outgained the News in the metro area—two-to-one daily and by an even greater margin on Sunday during the past six months. . . . (citations omitted)".

exemption from prosecution than is available under other antitrust exemption statutes,[6] and specifically does not exempt the parties to the agreement from liability for "any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity." 15 U.S.C. § 1803(c).

The JOA approved by the Attorney General and affirmed by the panel majority is inconsistent with this congressional purpose because it was based on a competitive situation created entirely by the interactive intentional conduct of the parties and not by market conditions. The Attorney General's definition of failing newspaper affirmed by the panel majority "allows parties situated as Gannett and Knight-Ridder are artificially to generate and maintain the conditions that will yield them a passing JOA." 868 F.2d at 1299 (Ruth B. Ginsburg, J., dissenting).[7]

[6] *Cf., e.g.*, 49 U.S.C. § 11341 (exemption from the antitrust laws as necessary to carry out transactions authorized by Interstate Commerce Commission).

[7] In many cities where papers were granted JOAs either before or after passage of the Newspaper Preservation Act, one newspaper succeeded where another failed over a protracted period of time. The failing newspaper was frequently marked by declining readership and circulation, resulting in declines in market penetration and advertising.

The cause of these declines often included an inferior news and editorial product, less efficient delivery service, more costly means of production or less adept management. In some cases, a newspaper's decline could be attributed to less interest by their stockholders in newspaper publishing, or difficulty in transition from one generation to another in the family business of the newspaper. It is unlikely, therefore, that Congress had foreseen a situation where one newspaper attempted to dominate or monopolize the market through intentional below-cost pricing. Below-cost pricing has not been a major concern in JOAs considered since the passage of the Newspaper Preservation Act prior to the Detroit case.

The Attorney General himself explained that the losses suffered by the two Detroit papers are not attributable to market forces:

> [The Free Press] plainly does not face external market forces—such as rising costs, competition from other media outlets and the siphoning off of readers from the metropolitan region to the suburbs—that would portend almost certain failure. Nor . . . do there exist marketplace declines in overall advertising and newspaper circulation in Detroit of the sort that traditionally propel a junior newspaper into the proverbial "downward spiral" that is fatal to survival.

Attorney General Decision at 8.

The Administrative Law Judge concluded that the operating losses incurred by both newspapers were "attributable to the same causes—an attempt . . . by a deep pocketed chain to achieve market domination and future profitability at the cost of current profits. . . ." ALJ at 19-20.[8] This behavior raises significant questions whether a JOA should be available under such circumstances. As then Assistant Attorney General Douglas Ginsburg stated in concluding that the parties had not yet justified a JOA:

> The losses of the Free Press were sustained in an effort to achieve "dominance." When a newspaper owner consciously and deliberately decides to sacrifice short-term profits in a quest for greater long-term profits, indeed monopoly profits, should a JOA be

[8] The struggle has led, as the panel majority stated, to "large operational losses by both papers." *Michigan Citizens*, 868 F.2d at 1289. Those losses have deepened considerably since Gannett bought the Detroit *News* in 1986. In 1985, the year before Gannett bought the *News*, the *News* made a profit of $667,000 while the *Free Press* lost $8.4 million. In 1986, under Gannett ownership, the *News* lost $13 million and the *Free Press* lost $17 million. ALJ at 63, 71; Report of Assistant Attorney General Douglas H. Ginsburg in the Matter of Application by Detroit Free Press, Inc., *et al.*, Public File No. 44-03-24-8 (July 23, 1986) ("AAG Report") at 38.

> available as a "second-best" alternative? This issue is especially important here because the Free Press has not lost the battle; rather, it and the News, according to the statement of the chairman of the parent companies, have "fought to a virtual draw."

AAG Report at 6-7.

Granting a JOA to "this sort of self-serving, competition-quieting arrangement," *Michigan Citizens*, 868 F.2d 1299 (Ruth B. Ginsburg, J., dissenting), rewards potentially predatory conduct and removes the natural incentive a competing newspaper has to engage in market behavior designed to maximize short-term profit. Normally the profit motive together with the need to survive insures that a business will conduct itself to assure maximum short-term profits. By guaranteeing survival, a share of supracompetitive profits and probable monopoly to surviving newspapers that qualify for a JOA, the Act weakens one of these normal marketplace incentives.[9] If

[9] Robert Bork in his seminal work, *The Antitrust Paradox*, dismissed the consumer threat of predatory pricing, concluding that such conduct was irrational in most cases because the strategy would not succeed. A linchpin of his logic is that such conduct would produce a "fight-to-the-death":

> First, the modern law of horizontal mergers makes it all but impossible for the predator to bring the war to an end by purchasing his victim. . . . Even the much less stringent merger law advocated elsewhere in this book would preclude the attainment of the monopoly necessary to make predation profitable. This means that the price war must be protracted until the victim's facilities are entirely driven from the industry, without possibility of return, and there will always be the danger, until the victim's organization and facilities are irretrievably scattered, that an outside purchaser may appear; then the costly war will have been for nothing."

R. Bork, *The Antitrust Paradox* 153 (1978). The panel majority fails to recognize the significance of predatory pricing disincentives on market-place behavior. After the court's holding, predation becomes not irrational, but supremely rational. Without thoughtfully drawn disincentives, predation in a context like Detroit is inevitable.

the standard for a failing newspaper under the Act is not brightly drawn and carefully enforced, as Congress intended, the Act may encourage conduct that is destructive of competition by completely removing any motive for short-term profit maximization in favor of long-term rewards.[10]

The standard set by the Attorney General and affirmed by the panel majority gives minimal consideration to the concern that parties might engage in such short term destructive behavior. The Attorney General blamed this result on Congress: "Congress opened the door to just this sort of response with the passage of the Newspaper Preservation Act." Attorney General's Decision at 12. The majority acknowledged that the "real difficulty with this case" is the fear that "[n]ewspapers in two newspaper towns will compete recklessly because of a recognition that the loser will be assured a soft landing," *Michigan Citizens*, 868 F.2d at 1296, but attributed this difficulty to the statute's "dual motive" of preserving editorial voices balanced with the "pro consumer direction of the antitrust laws." *Michigan Citizens*, 868 F.2d at 1293, 1297.[11] The problem is that both the Attorney General and the court in their analyses ignored the purpose, language and intent of the Act as expressed by Congress.

Congress recognized that the newspaper business was like many other businesses and that, over time, some

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[10] Chief Judge Wald, dissenting from the denial of rehearing *en banc*, questioned the wisdom of condoning such methods of competition: "Nor do I see how a court can ignore the fact that the economic behavior on which the Attorney General's grant of immunity rests comes perilously close if it does not actually constitute 'a practice inimical to the purpose of the antitrust laws,'" 868 F.2d at 1305 (Wald, J., Edwards, J. and Mikva, J., dissenting), citing *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 121 n.17 (1986).

[11] According to the panel majority, "the Attorney General *implicitly* recognized that it would be impossible completely to preclude competing newspapers from factoring into their business strategy the prospect of a JOA." (emphasis added) *Michigan Citizens*, 868 F.2d at 1297.

firms would succeed while others would fail for a variety of reasons: less adept management, poorer marketing skills, an inferior quality product (news), worse distribution (home delivery service) and poor financial management. The strength of America's economic system depends on giving firms the freedom to fail, affording survival to those that offer the best product and service at the best price. In deciding to provide some level of protection to failing newspapers from the laws of economics, Congress realized, however, that communities lost more than economic competition with the demise of a daily newspaper. In most cities, the loss of economic competition was coupled with the loss of journalistic competition. In passing the Newspaper Preservation Act for failing newspapers, Congress' intent was to preserve journalistic competition, even if it resulted in some measure of loss of economic competition.

Just as two competing newspapers have an opportunity to succeed or fail in the economic and journalistic marketplace, two newspapers are entitled to expect the protection of the Newspaper Preservation Act if and only if one's failure is due to an evolutionary process of legal competitive behavior. But just as a newspaper should not risk victory by below-cost pricing, neither should such pricing serve as justification for eliminating economic competition between newspapers.

Rewarding the conduct here with a "premature" JOA justifies the otherwise irrational short-term behavior of the parties, and is contrary to congressional intent. Congress' intent was never to condone such below cost pricing in order to justify a JOA. "Making the JOA an option now, in the situation artificially created and maintained by the Free Press and the News, moves boldly away from the 'frame of reference [Congress] essentially embraced' . . . ." *Michigan Citizens*, 868 F.2d at 1300 (Ruth B. Ginsburg, J., dissenting).

C. The Decision Creates a Blueprint for Destruction of Newspaper Competition in Little Rock and Elsewhere

The danger evident from affirming the Attorney General's approval of the Detroit papers' JOA is that it endorses the anticompetitive tactics used. A chain such as Gannett can acquire the dominant newspaper and create in any two-newspaper market a situation where its competitor faces "probable failure" as the Attorney General defines it. Gannett is the largest newspaper company in the United States, owning more than ninety newspapers that generated more than three billion dollars in revenue and $590 million in pre-tax income in 1987. ALJ at 10; Gannett Co., Inc., 1987 Annual Report 53 (1988). Indeed, Gannett owns and operates newspapers in six of the twenty markets with JOAs. *Editor & Publisher*, Aug. 13, 1988, at 15.

The situation in Little Rock illustrates starkly the Gannett strategy that approval of this JOA has endorsed. Prior to 1986, Gannett intentionally avoided buying newspapers in competitive two newspaper markets. But in 1986 Gannett's strategy changed as it acquired profitable newspapers in two such markets, Detroit and Little Rock. Prior to its acquisition in 1986 by Gannett, the *Arkansas Gazette* had operated profitably for every year of the Twentieth Century, including the years of the Great Depression. Hussman Affidavit, ¶ 3.[12] Since acquiring the *Arkansas Gazette*, Gannett has operated the paper at an intentional and substantial loss for the apparent purpose of forcing the *Democrat* to

[12] The Affidavit of Walter E. Hussman, Jr., the publisher of the *Arkansas Democrat* and Chief Executive Officer of Little Rock Newspapers, Inc., dated August 31, 1988, submitted as part of the record in the district court, was an Addendum to LRNI's *amicus* brief in the court of appeals and is found at Appendix B hereto.

incur more substantial losses. *Id.* As was done in Detroit, Gannett increased discounting of circulation prices to unprecedented levels, increased promotional expenditures to record highs, and reduced advertising rates after the *Arkansas Democrat* implemented rate increases. Hussman Affidavit, ¶ 5; *cf.* ALJ at 19-20.

On Sunday, August 14, 1988, six days after approval of the Detroit JOA but before this case had been filed, Gannett made its move in Little Rock. It reduced home delivery subscription rates to all subscribers by 57.5 percent. Hussman Affidavit, ¶ 6. In addition, the *Gazette* announced that it would deliver tens of thousands of Friday and Saturday newspapers free. *Id.* This reduction was made at a time when the *Gazette's* circulation was already increasing. The *Gazette*, already losing millions, could face approximately $7 million in additional operating losses as a result of this rate reduction. *Id.*, ¶¶ 3, 6. This simple predatory act could only have been done for the purpose of eliminating the *Arkansas Democrat* from the market or forcing the *Arkansas Democrat* into a JOA, as is evident by contrasting the rates now charged by Gannett in Little Rock with its monthly charges in other markets in which it operates. *See* Hussman Affidavit, ¶ 8.

If the *Arkansas Democrat* is forced to match losses with a company generating over $590 million in pre-tax profits, the alternative it ultimately may face is the prospect of elimination from the market unless it acquiesces in a JOA. Like the *Free Press*, there would be no unilateral way out for the *Arkansas Democrat*. So long as Gannett can pursue such a strategy using Detroit as a precedent, Gannett is free to eliminate economic competition in the remaining 25 competitive newspaper markets, capturing all or a JOA share of the monopoly profits.

Monopoly profits under a JOA would be large in Arkansas. They will be enormous in Detroit.[13] While the *Arkansas Democrat* recognizes that a JOA may provide immediate short-term profits, the *Arkansas Democrat* is more concerned with the longer term and with remaining an independent newspaper. This is a goal encouraged by public policy and the Newspaper Preservation Act itself, but it is dangerously undermined by the panel's decision here.

CONCLUSION

For the reasons stated above, the decision of the court of appeals affirming the Attorney General's approval of the Detroit joint operating agreement should be reversed.

Respectfully submitted,

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Dated: June 30, 1989

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[13] Financial analysts currently value the Detroit newspapers at $400 million; if the JOA goes forward, they say the two Detroit papers will be worth more than $3 billion in five years. *See N.Y. Times*, Sept. 15, 1988, at D1, D26.

APPENDICES

Drawing Power.

The trend is clear. The Free Press is the newspaper gaining momentum in metro Detroit.

Fact is, Free Press circulation outgained the News in the metro area—two-to-one daily and by an even greater margin on Sunday during the past six months.*

More Detroiters are coming our way because they prefer a quality product. The Free Press is Michigan's most honored newspaper — winner of a 1989 Pulitzer Prize. And the Free Press sports section won a rare triple crown in the recent Associated Press Sports Editors (APSE) national competition, making the top 10 in all three major categories — best daily section, best Sunday section and best special section (the "Seoul '88" Olympic preview). Meanwhile, Mitch Albom was voted the nation's No. 1 columnist for an unprecedented third year in a row.

Take advantage of the upward trend towards the Free Press in Michigan's most lucrative market — advertise in the newspaper that's moving up in metro Detroit.

*Source: ABC FAS-FAX Report, September, '88 vs. March, '89 for six-county C&RTZ.

Detroit Free Press
Michigan's great morning tradition

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 88-2322

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, *et al.*,
Plaintiffs,

v.

UNITED STATES ATTORNEY GENERAL RICHARD THORNBURGH *et al.*,
Defendants.

AFFIDAVIT OF WALTER E. HUSSMAN, JR.

I, Walter E. Hussman, Jr., after being duly sworn do state:

1. I am a shareholder in the parent company of Little Rock Newspapers, Inc. and its chief executive officer. Little Rock Newspaper, Inc. publishes the *Arkansas Democrat* and I am the president and publisher. The *Arkansas Democrat* is a daily newspaper of statewide circulation with its principal market for readers and advertisers in the central part of the State.

2. Little Rock is one of only approximately twenty-five communities where daily newspapers that are separately owned compete for advertisers and readers. The *Arkansas Democrat* competes with the *Arkansas Gazette*, which is published by the Arkansas Gazette Company. That Arkansas corporation was acquired by Gannett Co., Inc. on December 1, 1986.

3. Until the acquisition by Gannett, the *Arkansas Gazette* had consistently been a profitable newspaper. The *Gazette* had been operated at a profit every year of the Twentieth Century, including the years of the Great Depression. It was and remains the dominant newspaper in the Little Rock market with a larger share of advertising and more subscribers than the *Democrat.* Since acquiring the *Gazette* 'Gannett has operated the newspaper at a substantial loss with the apparent intention of forcing the *Democrat* to incur more substantial losses. According to an article in the *New York Times*, which appeared on August 18, 1988, Merrill Lynch reported the *Gazette's* losses to have reached ten million dollars per year. (See Exhibit A.)

4. Since 1979 the *Democrat* has progressed within the Little Rock market from a failing newspaper to a viable competitor of the *Gazette* with increasing readers, advertisers, and revenues. But for Gannett's change in the pricing policies and practices of the *Gazette*, the *Democrat* would have become a profitable newspaper. This profitability could have been achieved while the *Gazette* retained dominance and continued profitability. These circumstances prove that Little Rock can support two, separately-owned, competing newspapers.

5. Gannett's strategy in Little Rock appears to be to engage in predatory pricing and practices for both advertising and circulation. Although it is the dominant newspaper with some 60% of the revenues, Gannett's *Gazette* has repeatedly offered advertising rates lower than those offered by the *Arkansas Democrat.* Gannett has also increased discounting of circulation prices and promotional spending to unprecedented levels. In many cases Gannett has intentionally tried to reduce the revenues of the *Arkansas Democrat.* For example, on March 1, 1987, four months after Gannett bought the *Gazette*, the *Democrat* implemented a 6% advertising rate increase. The next day, March 2, Gannett reduced *Gazette*

advertising rates with some rates cut as much as 50%. These tactics by Gannett, however, were subtle and repetitive rather than dramatic. After Attorney General Meese announced approval of the Detroit joint operating agreement, these subtle tactics changed dramatically.

6. On Sunday, August 14, six days after approval of the Detroit JOA by Attorney General Meese, Gannett announced in the Sunday edition of the *Arkansas Gazette* plans to reduce circulation of home delivery subscription rates to all Gazette subscribers by 57.5% (see Exhibit B). This move will cost the *Gazette* approximately seven million dollars in operating revenues. This type price reduction is unprecedented in the newspaper industry. This across-the-board price reduction enhances the dangerous probability of eliminating newspaper competition in Little Rock, regardless whether the *Democrat* matches the offer.

7. This price reduction comes at a time when the *Gazette* is reporting circulation increases and has circulation dominance. On the most recent Audit Bureau of Circulation publisher's statement for the six months ending March 31, 1988, the *Gazette* had 139,448 daily and 201,773 Sunday circulation compared to 102,152 daily and 187,114 Sunday circulation at the *Democrat.*

8. New rates charged by Gannett for its *Arkansas Gazette* means a subscription price change from $1.98 to 85¢ per week. Sunday-only prices were reduced from 60¢ per week to 20¢ per week. At these lower prices, all Sunday-only subscribers will get the Friday and Saturday paper free. At 85¢ per week, the *Arkansas Gazette* will have the lowest subscription prices of any seven-day paid daily circulation paper of over 20,000 circulation in the United States. At 85¢ per week, less than $3.69 per month, the *Arkansas Gazette* rate is substantially below rates charged by any of Gannett's

other ninety daily newspapers. By contrast the monthly charges of other Gannett papers are:

	Daily & Sunday	Sunday Only
Shreveport (La.) Times	$11.25	$6.25
Springfield (Mo.) News	$10.85	5.45
Nashville (Tenn.) Tennessean	13.00	6.50
Jackson (Ms.) Clarion-Ledger	12.00	5.50
Hattiesburg (Ms.) American	9.00	4.35
Monroe (La.) News Star World	9.00	5.50
Muskogee (Okla.) Phoenix	8.75	3.15
Arkansas Gazette	3.69	0.83

9. Although Little Rock Newspapers, Inc. is part of a family-owned holding company, Gannett's pockets are far deeper than those behind the *Arkansas Democrat*. *Gannett* has revenues of over three billion dollars compared to seventy million dollars for the owners of the *Democrat*.

10. Attorney General Meese's decision to overrule the Justice Department Administrative Law Judge appears to have removed any restraint imposed on Gannett with respect to its corporate goal of eliminating competition from the *Democrat* either through forcing it out of business or into a joint operating agreement.

/s/ Walter E. Hussman, Jr.
WALTER E. HUSSMAN, JR.

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 31 day of August, 1988.

/s/ Neita D. Nattis
Notary Public

My Commission Expires:
April 20, 1990.

EXHIBIT A

The New York Times, Thursday, August 18, 1988

MARKET PLACE

Philip E. Ross

Detroit's Papers: What Pact Means

The Justice Department's decision last week to allow The Detroit Free Press and The Detroit News to merge their business operations promises to turn red ink into black if the arrangement is upheld by the courts. A Federal district judge yesterday stayed the agreement until mid-September.

The two papers have sustained large losses for many years and argued that they needed to combine business operations to return to profitability. But despite the approval of the agreement last week, the stocks of the Gannett Company, which publishes The News, and of Knight-Ridder Inc., which publishes The Free Press, have fallen slightly since the announcement.

Gannett's shares closed yesterday at $31.75, up 12.5 cents, and Knight-Ridder's at $39.75, down 37.5 cents.

* * *

Analysts generally counseled against looking for any quick profits at the two companies because the industry in general is being squeezed by rising newsprint costs and falling advertising linage. Nonetheless, they said the two chains, and particularly Gannett, were worth holding for their long-term prospects. Gannett's newspapers, they added, had more room for growth.

Through the Joint Operating Agreement, Gannett and Knight-Ridder are dividing monopoly profits in the sixth-largest market in the country by consolidating their ad-

vertising and administrative staffs. Editorial independence will not be sacrificed, executives at both chains said, although the weekday News will no longer be published in the morning, head-to-head with The Free Press.

They are to run the papers through a joint venture, the Detroit News Agency, with Gannett holding a majority of the directorships and receiving 55 percent of the profits. Decades of price competition will end tomorrow, when the price of each paper will rise on weekdays by 5 cents, to 20 cents for The News and to 25 cents for The Free Press. The Sunday paper, which is to be produced jointly by the staffs of the two papers, will rise 25 cents, to $1. Advertising rates will also go up.

Gannett's market price had already reflected most of the gains from the agreement, analysts said, because the company stood to win no matter what the Justice Department decided. Knight-Ridder had pledged to close The Free Press if the plan was rejected, and that would have handed Gannett a monopoly in Detroit.

For its part, Knight-Ridder has just made some acquisitions that have the effect of diluting the immediate benefits of the joint agreement, analysts said.

John S. Reidy, an analyst for Drexel Burnham Lambert in New York, said that by 1991 the business combination should raise corporate earnings by 15 to 20 cents a share for Gannett and by 50 to 60 cents a share for Knight-Ridder, which has one-third as many shares outstanding.

He expects Knight-Ridder to earn $3.05 a share this year and $3.25 a share next year, and predicts that Gannett will earn $2.25 a share and $2.50 a share in those periods. "We've had Gannett on our recommendation list, but not Knight-Ridder, because we felt they're going to have tough times with their slower-growth papers"

like The Miami Herald and The Philadelphia Inquirer, he said.

Bruce Thorp, a media analyst for the Provident National Bank in Philadelphia, said this year's results may actually be hurt by the accord because of severance payments and other consolidation costs. "But I'm still not recommending either stock because the overall business is so bad," he said. "It's almost as if a recession has hit newspapers already with advertisers cutting back." He expects Knight-Ridder to earn $2.95 a share this year and $3.20 next year, and Gannett to earn $2.25 a share this year and $2.40 next.

Peter Falco, an analyst for Merrill Lynch in New York, said the swing would be 20 to 25 cents a share for Gannett and 55 to 65 cents a share for Knight-Ridder. But he said Knight-Ridder had made acquisitions in the last six weeks that could dilute its earnings by 30 cents a share.

* * *

Gannett also has had a tendency to spend on long-term projects, like USA Today, its national newspaper, Mr. Falco said. Mr. Falco said that a year ago he thought that Allen H. Neuharth, chairman of Gannett, wanted only to bring USA Today to the break-even point. But now, he said, Mr. Neuharth, appears to want the paper to be profitable, a task that requires much more money.

"Beyond that, Gannett is investing in a little paper, The Arkansas Gazette, and could lose $10 million," Mr. Falco added.

Mr. Falco said the market cared more about the short term and the two media companies cared more about the future. "It would certainly increase the enthusiasm of investors for the joint operating agreement if they thought they were going to see some of it in earnings," he said.

EXHIBIT B

ARKANSAS GAZETTE
Little Rock, Sunday, August 14, 1988

DEAR READERS

If news is an event that's unusual, then this is front page news.

The price of something is going down.

Starting Monday, the *Arkansas Gazette* will cost only 85 cents a week. The only catch is you have to be a seven-day-a-week, home delivery subscriber and pay by mail 12 weeks in advance.

Previously, the same *Gazette* cost $1.98 a week. (If you're currently a subscriber, you'll get the new, lower rate automatically when your current subscription expires.)

We're cutting our price for a couple of reasons to become more competitive in this most competitive newspaper state and to give our readers some good news as inflation seems to be creeping upward again.

In the last few months, we've introduced an improvement every month in the *Gazette*. In April, we unveiled the new Sunday Forum section. In May, we started the Tuesday Health and Fitness section in Features. In June, we started three locally tailored new sections to better cover Pulaski and Saline counties. In July, we added two extra pages a day to the Sports section, which gave us room for a daily outdoors/recreation page, a second baseball page and other additional features and coverage.

The price reduction is August's improvement.

The *Gazette* will be adding more improvements. Remaining "Arkansas's Best Newspaper" requires it.

WILLIAM T. MALONE
Publisher of the Gazette